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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KAVIN WINSON MCCOY,

Defendant and Appellant.

D052680

(Super. Ct. No. SCE254922)

APPEAL from a judgment of the Superior Court of San Diego County, Allen J. Preckel, Judge. Affirmed.

A jury convicted defendant Kevin McCoy of two counts of robbery in concert (Pen. Code, §§ 211/213, subd. (a)(1)(A),<sup>1</sup> counts 1 and 2), residential burglary (§§ 459/460/667.5, subd. (c)(21), count 3), and assault with a semi-automatic firearm (§ 245, subd. (b), count 4), and found true the special allegations that McCoy personally used a firearm during the commission of all four offenses (§ 12022.5, subd. (a)). The jury also found true the special allegations that McCoy intentionally discharged the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

firearm and caused great bodily injury during the commission of count 1 (§ 12022.53, subd. (d)) and intentionally discharged the firearm during the commission of count 2 (§ 12022.53, subd. (c)). After the court found true a variety of prior conviction and strike allegations, the court sentenced McCoy to an indeterminate 25-year-to-life term on the count 1 great bodily injury enhancement (§ 12022.53, subd. (d)) and to a determinate term of 27 years 8 months for the offenses and other enhancements.

McCoy's sole argument on appeal is that the evidence was insufficient to support the jury's determination he intentionally fired the shots that injured the victim of the robbery.

## I

### FACTS

#### A. Prosecution Evidence

On August 20, 2005, McCoy (also known as B-Note) was with six other people (Messers. Beebe, Betts, Johnson, and Watkins, and Misses Franco and Murphy) driving around in two cars, one owned by Johnson and the second (a black SUV) owned by Beebe. They were communicating by walkie-talkies, plotting a prospective crime. They ultimately decided the two females in the group (Franco and Murphy) would pose as prostitutes at a local casino and lure prospective customers out of the casino to a location where the group could rob them.

When they drove to the casino, McCoy and Franco were sitting in the backseat of Beebe's black SUV. McCoy was wearing a bright blue "FUBU" brand jacket. When the group arrived, they entered the casino, and Franco and Murphy began seeking victims

while McCoy and the other men watched and telephoned instructions to them. A casino surveillance videotape showed the men following the women and showed McCoy wearing the bright blue jacket.

Three men (Messers. Karimi, Rahmani and Tamar) were in the casino to visit a friend (Mr. Niknam) who worked there. While inside the casino, the three men met Franco and Murphy. The women joined the three men and they played slot machines together, with Rahmani paying the bill for the group. After a while, Johnson telephoned Franco and instructed her to leave the casino with the men. Franco suggested to Karimi that the group leave, and he agreed, but they waited for Niknam to finish work at midnight.

When Niknam left work, he went to retrieve his car while Rahmani and Tamar left in a separate car. Karimi and the women waited for Niknam in the parking lot outside the casino and, while waiting, Johnson telephoned Franco and instructed her to get into the car with the men and leave. While waiting for Niknam, Karimi saw Beebe's SUV drive past them and saw McCoy, a passenger in the black SUV, looking at Karimi and the women.

When Niknam arrived with his car, he picked up Karimi and the women and drove to Niknam's apartment in El Cajon. They were followed by the men riding in Johnson's and Beebe's cars. Murphy was in constant telephone contact with Johnson and Beebe.

After Niknam arrived at his apartment, he prepared food in the kitchen while Karimi and the women sat in the dining room waiting for Rahmani to arrive. Murphy received several telephone calls from Johnson and Beebe and walked outside the front

door to take each of the calls. Approximately 15 minutes later, Rahmani arrived and joined everyone in the dining room. Before coming into the apartment, Rahmani had noticed a man, wearing a bright yellow shirt, behind a car outside.

A few minutes after Rahmani arrived, Murphy received another telephone call and left through the front door, but this time she did not return. Instead, she met Johnson outside, and he directed her to wait in one of the cars. Murphy joined Watkins in Beebe's SUV. Shortly thereafter, several men, including McCoy, charged into the apartment through the open front door. Although each man had his face covered in some fashion, one of the invaders was wearing the bright blue jacket McCoy had been wearing earlier that evening.

The invaders repeatedly demanded money. One of the men approached Karimi and repeatedly hit him. Another invader approached Niknam in the kitchen and knocked him to the ground with several punches to the face.

The blue jacketed invader, wearing a nylon stocking over his head, approached Rahmani and pointed a gun at him. The gunman held the gun sideways about two inches from Rahmani's face. Rahmani started to stand up to confront the gunman, but as he did so, the gunman shot him in the face, one inch below his right eye. Rahmani suffered severe injuries.

The invaders grabbed several items and ran out of the apartment. Everyone except McCoy got into the cars and drove off. McCoy, who lived across the street from Niknam's apartment at the time of the incident, departed on foot. The other members of the group met at Beebe's apartment but McCoy did not join them.

Police responded to the apartment and found Rahmani. Officers found a .380 caliber bullet lodged in a wall. When police arrested McCoy, they searched his residence and found the bright blue FUBU jacket in his closet. McCoy admitted to police he was one of the men pictured in the casino surveillance tapes.

#### B. Defense Evidence

Mr. Malone was near the apartment complex on the night of the robbery. He saw an acquaintance, Mr. Flemister, who was part of a group of men in the parking lot for the complex. Flemister had a gun.

Mr. Vasquez testified he rented a room to Beebe and Franco. The day after Beebe was arrested, Vasquez found Franco packing her things to leave town. Franco told Vasquez that Beebe had accidentally shot someone. Franco and Beebe left most of their possessions in the room when they moved out, among which was .22 caliber ammunition hidden behind an entertainment center.

#### C. Prosecution Rebuttal Evidence

When Vasquez spoke with police, he originally stated Franco's statement was that Beebe was "involved" in a shooting, and only when pressed did Vasquez state Franco said Beebe was the shooter, although Vasquez was not adamant about the precise words she used. A .22 caliber weapon is incapable of firing a .380 caliber bullet.

## ANALYSIS

### A. Substantial Evidence Supported Defendant's Conviction

#### *Identity*

McCoy contends there was insufficient evidence from which a reasonable jury could have concluded beyond a reasonable doubt that he was the shooter because there were inconsistencies or uncertainties in the descriptions of the shooter given by the witnesses.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Both Karimi and Rahmani stated the shooter had several physical characteristics that distinguished McCoy from the other invaders.<sup>2</sup> Karimi also stated the shooter was wearing a blue jacket, like the one McCoy owned and had been wearing shortly before the shooting, while the other invaders had been dressed in distinctively different clothing. Additionally, both Karimi and Rahmani stated the pictures of McCoy taken by the

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<sup>2</sup> Both Karimi and Rahmani stated the shooter was African-American with a shaved head, and Karimi noticed the shooter had a small mustache and goatee. McCoy was the only invader with a bald head, and McCoy wore a small mustache and goatee at the time of the robbery.

casino's surveillance cameras resembled the person who shot Rahmani. Finally, statements from various accomplices provided evidence from which the jury could find McCoy was the shooter. Betts told police he had seen McCoy (whom he also called "the bald dude") inside the apartment holding a gun with his arm straight out just before hearing a shot fired. Beebe also told police McCoy had a gun and, when the invaders fled, McCoy was still holding the gun as he ran up to Beebe, and then cursed before running down the street.

McCoy relies on alleged discrepancies to assert the evidence was insufficient to support his conviction. For example, he notes Karimi thought the shooter was a teenager (while McCoy was nearly 29 at the time of the shooting) and had held the gun in his left hand, while Rahmani thought the shooter held it in his right hand. McCoy notes Karimi, although recalling the blue jacket at trial, did not mention the blue jacket in his statements to police, and Rahmani only remembered the jacket after police showed him the surveillance video. In contrast, McCoy notes Niknam thought the shooter was wearing a black or brown shirt. McCoy asserts similar questions infect the accomplice testimony, because all the other invaders denied being armed, but the victims recalled that two of the invaders had guns.

However, these purported inconsistencies or inaccuracies do not render the jury's verdict unsupported by substantial evidence. "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and] where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court." (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) "Apropos the

question of identity, to entitle a reviewing court to set aside a jury's finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all.

[Citations.] The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury . . . ." (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 493-494.)

The testimony of Betts, Karimi and Rahmani provided substantial evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that McCoy was the shooter.

### *Intent*

McCoy contends, even assuming the evidence permitted the conclusion that he was the shooter, there was insufficient evidence from which a jury could have concluded beyond a reasonable doubt that he intentionally fired the gun. McCoy notes there was some evidence consistent with an accidental shooting--because the gun discharged as Rahmani was standing up to confront another intruder<sup>3</sup> and an older .380 caliber pistol can be fired with very little pressure on the trigger--and therefore concludes there was

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<sup>3</sup> There was some ambiguity in the evidence. At trial, Rahmani testified he saw another intruder (*not* the person who held the gun at Rahmani's head) start to point a gun at Niknam, and Rahmani started to stand up to try to reach the other intruder, but that he was unable to reach the other intruder because he was shot before he could touch anyone. However, Rahmani apparently told an investigating officer he had been able to strike at the other intruder's hand before being shot by someone else.



insufficient evidence to support the specific intent element under section 12022.53, subdivisions (c) and (d).

"Specific intent may be, and usually must be, inferred from circumstantial evidence. [Citation.] 'When a specific intent is an element of the offense it presents a question of fact which must be proved like any other fact in the case. It is none the less a question of fact though it cannot be proved by direct and positive evidence. All the circumstances surrounding the act furnish the evidence from which the presence or absence of the specific intent may be inferred by the jury . . . .' [Quoting *People v. Maciel* (1925) 71 Cal.App. 213, 218-219.] [¶] . . . [¶] '[E]ven though the appellate court may itself believe that the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the determination of the trier of fact. [Citations.] Whether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Quoting *People v. Towler* (1982) 31 Cal.3d 105, 118.]" (*People v. Cole* (1985) 165 Cal.App.3d 41, 48-49.)

There was substantial evidence from which a reasonable jury could have inferred intent. The fact McCoy possessed a loaded, rather than an unloaded, gun permitted the jury to infer McCoy did not intend merely to employ the gun as a prop with which to intimidate the victims, but was instead prepared to use it if necessary. Indeed, the fact McCoy fired the gun almost immediately after Rahmani began to rise to resist the intruders corroborates the inference McCoy intended to use the weapon to quash any

resistance. Although McCoy argues on appeal that an older gun could accidentally fire on being struck, there was no evidence either that McCoy's gun was an older model *or* that it was ever struck by anyone.

We conclude there is substantial evidence from which a reasonable jury could infer McCoy fired the weapon intentionally rather than accidentally.

#### DISPOSITION

The judgment is affirmed.

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McDONALD, J.

WE CONCUR:

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NARES, Acting P. J.

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O'ROURKE, J.